SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 171.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

against

ALBERT L. PURDY.

Error to Supreme Court of the State of New York.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The brief submitted for the defendant in error requires that counsel for the plaintiff in error file this reply, that his duty to his client and this Court may be properly discharged.

POINTS.

I.

The mileage legislation of the State of New York which is in question here was claimed to be unconstitutional and void by virtue of "various" provisions of the Constitution of the United States, as appears by every answer filed by the Erie Railroad Company, and as appears by its motions to dismiss, to direct a verdict, and its exceptions to the rulings made and to the direction of a verdict against it, its motion for a new trial in the Appellate

Division, its appeal to the Court of Appeals, and the very opinion of the Court of Appeals, which Court alone wrote an opinion in the case.

(Answers, pp. 49–61; motion to dismiss, p. 65; motion for nonsuit, pp. 102, 103; direction of a verdict and exceptions, p. 104; exceptions ordered heard in the Appellate Division in the first instance, p. 105; motion for a new trial on such exceptions in the Appellate Division, p. 107; order overruling exceptions, denying motion for a new trial, and directing judgment for plaintiff, and judgment for plaintiff, pp. 108, 109; appeal to the Court of Appeals, p. 110; opinion of Court of Appeals discussing each Federal question upon the merits, pp. 116–120; assignments of error, pp. 120–122.)

In the light of the facts above stated, and the record above referred to, we do not understand how counsel can start out with the statement "that the only Federal question raised * * * "was that the Act in question was an attempt * * * to regu- "late commerce."

It was claimed from the beginning, by answer, motion and exception, that "other" provisions of the United States Constitution, one or "various," also rendered the legislation in question unconstitutional. Purdy had due notice that Federal *questions* were intended to be and were raised. Purdy having pleaded the statute of the State of New York as the basis on which to recover a penalty, if the Erie Railroad Company pleaded the provision of the Constitution with reference to regulating commerce, as a defense, and also "various other provisions" of the Constitution as a defense, and expressly reserved the right to claim that no cause of action was set out, we cannot understand how any lawyer or judge can fairly say that the Erie Railroad Company did not thus claim, in due time, its constitutional rights under the Constitution of the United States. If Purdy desired to know what particular articles of the Constitution of the United States were relied on, he could move the courts to have the answer of the Erie Railroad Company made more definite and certain in this particular, and if his motion was granted the articles could be specified. In the absence of such action, he cannot now claim that he understood the Erie Railroad Company to confine itself to a single provision of the Constitution of the United States, when every answer is to the contrary.

So, too, the motions to dismiss, to nonsuit, to direct a verdict, and the exception to the verdict directed against the Erie Railroad Company, are each and every of them broad enough to cover everything claimed by the answers. The same is true of the motion for a new trial on the exceptions. There is nothing in the record from beginning to end to show that these broad motions and exceptions were not intended to cover every possible claim that could be made under the Constitution of the United States.

There is nothing whatever to show that the Erie Railroad Company confined itself to the single constitutional provision with reference to regulating commerce. On the contrary, if it had intended to waive every other question and to confine itself to that question, no reason can be given for the form of every answer interposed; no reason can be given for the other broad motions made, as well as the motion made on the specific ground that it violated the Constitution with reference to regulating commerce.

The statute regulating the practice of this court in reviewing the final decision of State courts, and the decisions made under it, furnish no warrant for the argument submitted in behalf of Purdy. On the contrary, we have already shown in our previous brief that they are adverse to his contention in this particular. In view of the tenacity with which he hangs to his claim, in spite of the refusal of this court to dismiss this case, additional cases and considerations of this point may aid this court.

I do not understand the statute to have been substantially changed in this particular since September 24, 1789, when Chapter 20, Section 25, became the law. Within the very words of that statute, we have here "A final judgment * * * in the highest "court of a State * * * where is drawn in question the val- "idity of a statute * * * on the ground of their being re- "pugnant to the Constitution * * * of the United States, and "the decision is in favor of their validity; or where any title, right, "privilege or immunity is claimed under the Constitution * * * "and the decision is against the title, right, privilege or immunity "specially set up or claimed." (U. S. R. S., Section 709.)

Within the very words quoted, the very pleading of Purdy necessarily brings in question the statute on which he relies, and every answer of the Erie Railroad Company claims immunity from this statute, under the various provisions of the Constitution of the United States.

When we look at the decisions, they are equally favorable to our position. We have cited many of them in our previous brief, but quotations from others will also sustain our position. That position is that where a litigant in some manner fairly claims the protection of the Constitution of the United States under its "various" provisions, and does not waive any of them, or limit any of the motions or exceptions put on the record, if the question involved is one that in its very nature goes to the heart and life of the statute, the courts should examine the question on its merits. In this great land where all sorts of systems of legal procedure prevail, and all kinds of pleadings, motions and exceptions are permitted, and all sorts of motions to review and appeals are known, this court should not limit a broad claim made in the very first pleading, in a case of this character, without some evidence that the party making it has waived it and has intended to waive it in the courts below. A reason for this position is found in the quotation made from the Federalist. The language used was probably used by Hamilton, but whether used by him or not it is so clear and gives such a broad reason for this position, that it early attracted the attention of Ch. J., John Marshall, and he quoted it in his opinion in *Cohens vs. Virginia*, 6 *Wheat.*, 264. I quote a few sentences:

"Here another question occurs: What relation would subsist "between the national and State courts in these instances of concur- "rent jurisdiction? I answer, that an appeal would certainly lie "from the latter to the Supreme Court of the United States. The "Constitution in direct terms gives an appellate jurisdiction to the "Supreme Court in all the enumerated cases of Federal cognizance "in which it is not to have an original one, without a single expres- "sion to confine its operation to the inferior Federal courts. The "*objects of appeal*, not the tribunals from which it is to be made, are "alone contemplated. * * * Agreeably to the remark already "made, the national and State systems are to be regarded as *one* "*whole*. The courts of the latter will, of course, be natural auxil- "aries to the execution of the laws of the Union, and an appeal "from them will as naturally lie to that tribunal which is destined "to unite and assimilate the principles of natural justice, and the "rules of national decision. The evident aim of the plan of the "national convention is, that all the causes of the specified classes "shall, *for weighty public reasons, receive their original or final determ-* "*ination in the courts of the Union.*"

In *Crowell vs. Randell*, and *Shoemaker vs. Randell*, 10 *Peters*, 368, Justice Story reviewed the cases down to the January term of 1836, to show when the Supreme Court will review. Chief Justice Marshall had just died, and the opinion of Justice Story is full of quotations from his revered chief. This one will do as a sample:

"That construction is, that it is not necessary to state, in terms, 'in the record, that the Constitution or a treaty or law of the United 'States has been brought in question, or the validity of a State law 'on the ground of its repugnance to the Constitution. It is sufficient 'if the record shows that the Constitution, or a treaty or law of the 'United States might have been construed, or that the constitution-'ality of a State law must have been questioned; and the decision 'has been in favor of the party claiming under such law" (p. 397).

In *Armstrong vs. The Treasurer, etc.*, 16 *Peters*, 281, the law on this 'subject is thus stated (p. 285):

"This must be shown: first, either by express averment, or by 'necessary intendment in the pleadings in the case;

"Or, secondly, by the direction given by the court, and stated in 'the exception;

"Or, thirdly, when the proceeding is according to the law of 'Louisiana, by the statement of facts, and of the decision, as usually made in such cases by the court;

"Or, fourthly, it must be entered on the record of the proceed-'ings in the Appellate Court, in cases where the record shows that 'such a point may have arisen and been decided, that it was in fact 'raised and decided; and this entry must appear to have been 'made by the order of the court, or by the presiding judge by order 'of the court, and certified by the clerk, as a part of the record in 'the State court;

"Or, fifthly, in proceedings in equity, it may be stated in the 'body of the final decree of the State court from which the appeal 'is taken to this court;

"Or, sixthly, it must appear from the record that the question 'was necessarily involved in the decision; and that the State court 'could not have given the judgment or decree, which they passed, 'without deciding it.

"We are not aware of any other modes in which the judgment 'or decree of a State court can lawfully be brought before us; and

"we have stated them particularly, in order to prevent, in future, "the difficulties and discrepancies which have so often arisen on "this subject."

In *Curran vs. Arkansas*, 15 *How.*, 304, legislation of the State of Arkansas with reference to a State bank was involved in litigation in the courts of the State of Arkansas. The judgment necessarily held that the legislation in question did not impair the obligations of the contracts of the bank. The acts in question were specified in the pleadings, but, so far as I can discover, there was no specific claim made anywhere that the acts in question were unconstitutional under the Constitution of the United States, although we might draw that inference from the fact that the acts were attacked The court said:

"Each of these laws is specifically referred to in the bill, and its "operation upon the property of the bank averred, and made a "subject of complaint. * * * It necessarily follows, therefore, "that the Supreme Court of the State held these laws valid, and "that by force of them the State was not subject to the principles "upon which it would otherwise have been chargeable.

"It is sufficient * * * that it appears by the record that "the question, whether a law of the State impaired the obligation of "a contract, was necessarily involved in the decision, and that such "law was held to be valid, and the decision made against the "plaintiff in error by reason of its supposed validity." (Pp. 320, 321).

In *Furman vs. Nichol*, 8 *Wall*, 44, the legislation of Tennessee applicable to banks was involved; also the decision of the Supreme Court of that State thereon. In the pleadings nothing was said about the Constitution of either state or nation, but it was said it was not in the power of the State of Tennessee "to impair or annul "the validity or binding force of said contract." Upon such pleadings it is said:

"It is enough for the purposes of this suit to say, that a cause "can be removed from a State court * * * whenever some one "of the questions embraced in it was relied on by the party who "brings the cause here, and when the right he claimed it gave him "was denied to him by the State court" (p. 56).

In *Murray vs. Charleston*, 96 *U. S.*, 432, it does not appear that the unconstitutionality of the ordinances there questioned was pleaded or brought in question on the trial, but on the appeal the claim was made that the tax levied pursuant thereto "impairs the "obligation of said contract and is, therefore, unconstitutional and "void."

The highest court of the State did not sustain this claim. This court reviewed that decision, saying:

"Everywhere in our decisions it has been held that we may re- "view the judgments of a State court when the determination or "judgment of that court could not have been given without decid- "ing upon a right or authority claimed to exist under the Constitu- "tion, laws or treaties of the United States, and deciding against "that right. *Very little importance has been attached to the enquiry "whether the Federal question was formally raised*" (p. 442).

In *Spencer vs. Merchant*, 125 *U. S.*, 345, we have a writ of error to the Supreme Court of the State of New York to review a decision of that court and of the Court of Appeals. The case involved taxes a tax lien, and was submitted to the General Term on an agreed state of facts, which also stated the questions involved, and says nothing whatever about any constitutional question (p. 350). There, as here, the words of the Constitution of the State, and the words of the Fourteenth Amendment of the United States Constitution, are the same in substance. The court said:

"*No specific mention of either constitutional provision was necessary* "in order to entitle him to a decision of the question by any court "having jurisdiction to determine it. The adverse judgment of "the Supreme Court, affirmed by the Court of Appeals of the State, "necessarily involved a decision against a right claimed under the "Fourteenth Amendment to the Constitution of the United States, "which this court has jurisdiction to review" (p. 352).

Nor do authorities cited against us lay down a different rule as we have shown (former brief pp. 12–22). *Oxley S. Co., vs. B. Co.*, 166 *U. S.*, 648, now cited adversely is not authority against because that case admits the rule is "it is not always necessary to refer to "the precise words, or the particular Section of the Constitu- "tion * * * it is sufficient if it appears affirmatively from "the record that a right, title, privilege or immunity is specially

"set up, or claimed under that instrument" (p. 657). (See also former brief and cases pp. 28–30).

Additional and later authorities on this subject are quoted in our previous brief, pages 18–22. The quotations there made show that this question "is itself a Federal question," and the court below decided against us not because the question was raised "too late," but "on its merits." (See former brief, pp. 12–22, and cases cited; also opinion Gray, J., in *Carter vs. Texas*, 177 *U. S.*, 442, 447; opinion Peckham, J., in *Sully vs. Bank*, 178 *U. S.*, 289, 298.)

This is certainly a case where, to use the very words of the statute, a "title, right, privilege, or immunity, is claimed under the Constitution"; and this was "specially set up or claimed" in every answer of the Erie Railroad Company, at the very beginning of this litigation. Purdy was advised by each answer that this claim was as broad as the "various" provisions of the United States Constitution. There is nothing in the record to show that the Erie Railroad Company ever waived or ever intended to waive these claims, or any of them, by virtue of anything said or done on the trial, or upon any appeal.

If "weighty public reasons" require that questions of this character be reviewed by this court; that the State courts be treated as "natural auxiliaries to the execution of the laws of the Union"; in the language of the Federalist, adopted by Chief Justice John Marshall, it follows that the very theory of our government requires that cases of this character be reviewed by this court, if the successful party has had fair notice that the defeated party "claimed" protection under the various provisions of the United States Constitution.

If this case were a case in which the successful party could have given any evidence to change the result, and it appeared that he was misled by the pleading and therefore failed to give it, there would be a sound reason for refusing to exercise jurisdiction, but, in a case like this, where the successful party pleads and relies upon a State statute as the basis of this action for penalties, and the defeated party claimed this statute was unconstitutional under the various provisions of the Constitution of the United States, the highest court of the State having sustained the validity of the State statute, this court should reverse that decision, if the State statute was in fact unconstitutional within any of the various provisions of the Constitution of the United States. This is particularly true

where the State court considered the question upon the merits. Being true, the brief of Purdy's counsel is a silent admission that the case of *Lake Shore vs. Smith*, 173 *U. S.*, 684, is fatal to the judgment of the New York courts now here for review.

No serious attempt seems to be made to answer our previous brief, pages 30–41; also pages 50–53, on this point.

II.

Purdy's claim that Lake Shore vs. Smith, 173 U. S., 684, is not applicable because his action for penalties is based on the statute of 1895, which preceded the incorporation of the Erie Railroad Company, and, therefore, such unconstitutional statute became binding on the Erie Railroad Company, is unsound, because his action in fact was brought under and is dependent upon the statute of 1896, which was enacted after the Erie Railroad Company was incorporated.

The considerations and authorities brought to the attention of this court in our previous brief, pages 30–49, remain untouched and unanswered. Without again going into the authorities previously cited in support of Purdy's position, already referred to in that brief, I may do the court a service by briefly stating our position and calling attention to the character of some additional cases cited now in support of Purdy's position.

Our position is:

1. Every complaint in every action of Purdy demands a penalty because the Erie Railroad Company has violated the statute of the State of New York, "Laws of 1895, *as amended by Section* 1 *of Chapter* 835 *of the Laws of* 1896;" the claim being that the acts of the Erie Railroad Company are "all against the form" of the said statute (pp. 5–48).

2. The statute of 1896 contains every word of the statute of 1895, and also contains whole sentences adding new and very onerous conditions to the Act of 1895; the Act of 1895 being comparatively innocuous, and this being the reason why the Legislature "annihilated" it in this manner by the Act of 1896. (See former

brief, pp. 34, 35, containing the statute; also pp. 31–34, specifying some of the particulars in which the legislation makes the Act more onerous to railroads).

3. In the opinion of the learned court below, it is expressly conceded: "The statute of 1896 was passed subsequently to the "incorporation of the defendant, and if the statute increased the "burden imposed on the defendant by the Act of 1895, as to such "additional burden it would be invalid" (Record, p. 119).

4. A comparison of the two Acts shows that instead of the last Act being more favorable to the Erie Railroad Company, it did impose many onerous burdens on the Erie Railroad Company not imposed by the Act of 1895; in fact, the Act of 1896 came into being because the Act of 1895 was impractical and really imposed few, if any, burdens on the Erie Railroad Company and like railroads. (See our former brief, pp. 30–42).

5. The Act of 1896 imposing additional burdens on the Erie Railroad Company having been passed *after* the Erie Railroad Company was incorporated, Purdy's action cannot be sustained, because it rests on the Act of 1896.

6. Purdy's action cannot be sustained under the Act of 1895, because that is not pleaded as the basis of his action for penalties, and his demands are framed under and expressly refer to the Act of 1896. (Pp. 71–77 of Record).

7. The court below could not say, and this court cannot say, that the Erie Railroad Company would have refused a mileage book under the Act of 1895 alone, and, in accordance with its terms and conditions, if that alone had been demanded, and because the court below could not so decide and this court cannot so decide, it was essential, and is still essential, that the Act of 1896 be determined to be constitutional in order to sustain Purdy's action here, because it is an action for penalties and is to be judged by the strict rules of law that are applied to actions for penalties.

8. "Every demand made by Purdy was for a mileage book to "travel one thousand miles on the line or lines of your road "* * * under Chapter 1027 of the Laws of 1895, as amended by "Chapter 835 of the Laws of 1896 of the State of New York." (Record, pp. 71–77).

It being conceded that the Erie Railroad Company is an interstate railroad that runs through New Jersey, Pennsylvania, New York, Pennsylvania again, Ohio, Indiana and Illinois, (as shown by the map exhibit between pages 110 and 111, as was pleaded by the answers of the Erie Railroad Company), it follows that if the Erie Railroad Company had complied with the demand of Purdy, in the very language of the statute under which that demand was made, Purdy would have had the right, at once, or at any time, to exchange his book for an "exchange ticket" good "for the number "of miles which he, or any member of his family or firm, or sales-"man of such firm, wishes to travel on the line or lines of such "railroad."

He could do this "at any ticket office on the line or lines of such railroad."

It was further provided in 1896 for the first time: "*Such mile-"age exchange ticket shall entitle the holder thereof to the same rights and "privileges in respect to transportation of person and property to which "the highest class ticket issued by such corporation would entitle him.*"

Every one of these additional burdens was imposed by the Act of 1896, and Purdy could have demanded no mileage book or exchange ticket of the character demanded by him, but for these additional burdens imposed by the legislation of 1896. If such burdens are burdens the Legislature of New York could not impose on the Erie Railroad Company, then Purdy's demand that it subject itself to contracts good forever, by virtue of this unconstitutional burden which the Legislature undertook to place on the Erie Railroad Company after it was incorporated, permitted the Erie Railroad Company to refuse the ticket demanded, without thereby subjecting itself to penalties in this or any other action. (See statute, former brief, p. 35.)

9. The language from the Act of 1896 which is quoted also shows that the additions made to the legislation by the Act of 1896 clearly make it an Act regulating interstate commerce on the Erie Railroad Company as to passengers, because a person obtaining a "mileage exchange ticket" for one thousand miles, in the manner provided for in the statute, would be entitled to the same rights, according to the statute, to which the purchaser of the "highest class ticket issued by such corporation" would be entitled. The purchaser of the highest class ticket could travel from Jersey City

substantially to Chicago, a distance of a trifle over one thousand miles, and as the "holder of any such mileage ticket" could exchange it at once, or at any time, for a "mileage exchange ticket," for a number of miles "equal in number to the number of miles which he, or "any member of his family or firm, or salesman of such firm, wishes "to travel on the line or lines of such railroad," it follows that what Purdy demanded under the statute was a book that would legally entitle him to such a ticket, upon which it would be optional with him to travel substantially from New York to Chicago, "on the line or lines of such railroad."

Even if the courts of New York could construe such legislation as having reference only to the lines within the State of New York, still Purdy having demanded and obtained such a book, and then being entitled to such a "mileage exchange ticket" therefor, giving him these rights, the Erie Railroad Company would thus become a party to a contract with Purdy which would entitle Purdy to all the rights specified in the statute. The only way the Erie Railroad Company could protect itself from such a statute, such a book, such a mileage exchange ticket, or such a contract, was to refuse the book that would entitle the holder to such rights on its line or lines. Therefore, the failure or refusal of the Erie Railroad Company to furnish Purdy with such a book when demanded does not make it liable for penalties at his suit, because he could only entitle himself to penalties against the Erie Railroad Company by making a demand for what the Erie Railroad Company was legally obligated to give him, whereas, if he demanded a book as broad as a statute in part at least unconstitutional, illegal and unlawful, that demand could be lawfully refused by the Erie Railroad Company.

Nor do the additional decisions cited for Purdy meet these suggestions. Most of them are disposed of by the authorities cited and what is said in our previous brief, pages 35–41. The only additional authorities cited readily resolve themselves into two classes. One class is like *Pinney vs. Nelson*, 22 *Sup. Ct.*, 52, 54; *Turner vs. Board of Commissioners*, 173 *U. S.*, 461; and *Lehigh W. Co. vs. Easton*, 121 *U. S.*, 388; but these cases have nothing to do with the question, because they only hold, in substance, that if a contract is made after the passage of a statute touching its subject-matter, the contracting parties cannot claim that the statute previously made has in effect impaired the obligation of the contract.

The other class of cases is like *Matter of Prime*, 136 *N. Y.*, 347, which is distinguished in *People vs. Wilmerding*, 136 *N. Y.*, 363, on the ground that in the Prime case the provisions of the former act were not re-enacted "in identical language"; hence the latter statute did not repeal the former, as the latter statute did repeal the former in the Wilmerding case. (See former brief, pp. 38–40).

Of course, if the Erie Railroad Company had violated the Act of 1895 before the Act of 1896 came into being, the statutory construction act of the State of New York would have saved any cause of action under the Act of 1895, but as the demands were not made until the Act of 1896 had taken effect, no such question is presented here, and *Matter of Davies*, 168 *N. Y.*, 89, 100, therefore, has no application to this case. In that case, the acts complained of preceded the statute; here, the acts complained of followed the latter statute, and, therefore, the latter statute alone is to be construed.

III.

The additional authorities cited on behalf of Purdy to show that Lake Shore vs. Smith, 173 U. S., 684, does not reach this case on the merits, do not establish that proposition; but, on the contrary, the very liberty of contract essential to a common carrier for hire, that it may carry passengers through the various States through which the lines of the Erie Railroad Company run, makes it necessary that this court preserve the constitutional guaranties of the National Constitution, that commerce may remain free and unrestrained.

The legislation in question strikes at the income of the Erie Railroad Company, and, therefore, the same words in the Fourteenth Amendment become operative that the court enforced in *Smyth vs. Ames*, 169 *U. S.*, 466. That case clearly shows that where such property rights of the Erie Railroad Company are concerned, although a corporation, it stands on the same footing of a natural citizen. If engaged in interstate commerce, it should, therefore, have the same liberty of contract guaranteed to a citizen. Although the Erie Railroad Company is an artificial citizen of the State of New York, and subject to the laws of that State, within that State,

the courts of that State cannot deny to it the exercise of its contractual rights outside of the State, when interstate commerce is concerned. *The income of the corporation is protected from confiscation in Smyth vs. Ames; the liberty of the citizen to contract is upheld, Allgeyer vs. La.*, 165 *U. S.*, 578; *and interstate passengers and commerce moving by rail are free from State regulations, even in the State, Ill. C. R. vs. Ill.*, 163 *U. S.*, 142–153.

Allgeyer vs. La., supra, is clearly distinguished from *Hooper vs. Cal.*, 155 *U. S.*, 648, and that line of cases, by the fact that insurance "is not interstate commerce," and, therefore, acts done wholly within a State in obtaining insurance, are subject to the laws of such State (opinion, pp. 587, 588).

Cases like *Dodge vs. Cornelius*, 168 *N. Y.*, 242, have no bearing to the contrary, because there the statute of New York requiring a witness to a will to pay a penalty of $50 if he does not write his residence opposite his name, involved no question under the United States Constitution, and according to the opinion of the court, and the statement of the case, neither the answer nor any appropriate motion or exception on the trial, nor any appropriate motion for a new trial at the Appellate Division, raised the question of the constitutionality of such legislation, whereas here all those conditions are different. Although the courts of New York had already upheld the legislation in question when this trial took place, nevertheless, we expressly pointed out in our brief in the Appellate Division, quoted in our former brief here (p. 16), that it was claimed that the legislation in question did "violate the Constitution of the United States * * * upon the facts now before this court."

In like manner, counsel claims that the constitutional question was raised in *Beardsley vs. Erie R. R. Co.*, 162 *N. Y.*, 230, and, therefore, the Court of Appeals followed the decision of this court in the Smith case, whereas a report of that case, or an examination of the original Beardsley record, which we have, will show that the only ways in which the question was raised in that case was by a demurrer on the ground the complaint "does not contain facts sufficient to constitute a cause of action" (Beardsley record, p. 8); an answer that the law of 1895 was unconstitutional, because "it attempts to interfere with commerce between the States, the regulation of which has, by the Federal Constitution, been committed solely to Congress, as well as for other reasons" (p. 20); a general exception to the judgment of the court and an appeal (Beardsley record, pp. 33–37).

Here, each answer is much more explicit, and is expressly based on the interstate commerce clause and on "various other provisions" of the United States Constitution. So, too, each answer here starts out with insisting upon the legal defense that the complaint does not state facts sufficient to constitute a "cause of action" (p. 49).

Here, also, we have all kinds of motions that test the sufficiency of the legislation upon which Purdy depends, and all kinds of exceptions to the rulings of the court by which the court even directed a verdict against the Erie Railroad Company, whereas in the Beardsley case we find no such motions and no such exceptions in the record, but only a general exception and a general appeal. (Beardsley record, pp. 33–37.)

Upon such a showing, it cannot fairly be said that there is no distinction between the Beardsley case and this case, except that the Beardsley case involved the old Erie Railroad Company before the foreclosure, and involved the Act of 1895, whereas this case involves the new railroad company, and the Act of 1896. We have shown that the Act of 1896 is much more onerous than the Act of 1895, and, therefore, that in this respect this case is more favorable to the Erie Railroad Company than was the Beardsley case. All that is left of the distinction, therefore, is that the present Erie Railroad Company was incorporated after the Act of 1895 took effect and before the Act of 1896 was passed. Upon this point, we have tried to demonstrate, and we believe we have demonstrated, that there is no basis for the claim that the prssent Erie Railroad Company by its charter, or in any other way, agreed to assume the unconstitutional burdens of either Act; also that the Act of 1896 is the only one with which it has to deal, and certainly it did not assume the burden of the unconstitutional features of that Act by filing a certificate in 1895, when the Act was not passed until 1896. Upon these points we are willing to leave the case with what is said in our former brief, pages 30–49.

In substance, the whole contention on this point is that the present Erie Railroad Company is estopped from claiming that the legislation in question is unconstitutional. Such a doctrine is novel, obnoxious, and should never be applied except in a very clear case. Indeed, the Court of Appeals of the State of New York have long since expressly held that such a doctrine could not be applied even to a statute, saying: "A statute cannot be evaded by estoppel."

Opinion R. R. Co. vs. Van Horn, 57 *N. Y.*, 473–476.

If a statute cannot be evaded by estoppel, can the Erie Railroad Company be estopped from claiming the protection of the Constitution as a defense to an attempt to enforce an unconstitutional statute? It does not answer this question to show that corporations are subject to the laws of the State in which they do business provided they enter the State to do business under such circumstances, or provided they are incorporated under such circumstances as to clearly show a waiver of any claim that the statute under which they enter, or under which they are incorporated, is unconstitutional.

The numerous insurance cases with which counsel now seeks to sustain Purdy's judgment, do not reach this point. The foundation of all those cases is that the insurance companies cannot invoke the protection of the Constitution, because when they enter a State to do business they necessarily subject themselves to its insurance laws. Furthermore, the root difficulty with such cases is that "Issuing a policy of insurance is not a transaction of commerce."

Paul vs. Va., 8 *Wall.*, 168.
Philadelphia F. I. Co. vs. N. Y., 119 *U. S.*, 110.
Hooper vs. California, 155 *U. S.*, 648, 653, 654.
Orient Ins. Co. vs. Daggs, 172 *U. S.*, 557.
N. Y. L. Ins. Co. vs. Cravens, 178 *U. S.*, 389, 401.
Hancock Mut. L. Ins. Co. vs. Warren, 181 *U. S.*, 73.

It is entirely true that a State may tax the tangible or intangible property in that State of a corporation operating a bridge between two States, without thereby interfering with interstate commerce. The ground of such a decision is:

"The interference with the commercial power *must be direct*, and "not the mere incidental effect of the requirement of the usual "proportional contribution to public maintenance."

Erie R. R. Co. vs. Pa., 158 *U. S.*, 431, 439; *approved Henderson Bridge Co. vs. Ky.*, 166 *U. S.*, 154.

There was a strong dissent from this position in the last case, and the distinction is a very nice one, but it is sufficient to clearly disclose that the last case referred to is not an authority in favor of Purdy and his action for penalties.

Nor do cases like *Hopkins vs. U. S.*, 171 *U. S.*, 578, involving, by laws of an unincorporated live stock exchange in Kansas City, help Purdy, because that case expressly recognizes the distinction between things "whose direct and immediate effect is restraint upon that "kind of trade or commerce which is interstate," and things "not "*directly* connected with, as forming a part of, interstate commerce, "although the cattle may come from another State." (Opinion pp. 591, 592.

The last case shows that there may be local charges within a State *indirectly* affecting interstate commerce, and yet the legislation or the contracts producing such charges will be beyond the reach of the Federal authorities, whereas if legislation or contracts *directly* affect interstate commerce in a matter wherein Congress can "regulate" such commerce, it will follow that the State right must yield to the Federal right. In such cases the common carrier for hire engaged in transporting persons and property through various States should be as free as the citizen to make all proper contracts and charges; subject always to the power of the Interstate Commerce Commission to condemn any that are "unjust," "unreasonable," or those that make "undue" discrimination.

Here contrary to the Interstate Commerce Statute of Congress the New York legislature and courts order us to make such "undue" discrimination in favor of those having $20.00 in cash and against those who are poor.

IV.

The legislation of the State of New York, as construed by the judgment rendered by the courts of that State, regulates commerce between the States, and deprives the Erie Railroad Company of one-third of its income from passengers, without due process of law.

What we have just said under the last point may be repeated here.

We do not understand how it can be claimed that that Federal question, which it is admitted was sufficiently raised, was not necessary to the decision of the case, "for the judgment may well be supported upon the ground not involving a Federal question." (Brief for Purdy, Point V, p. 7).

Certainly, it is unnecessary to cite cases to show that if this case was determined below upon some primary question, independent of any Federal question, then this court will not review the judgment rendered. The cases cited against us hold no more, and need no further comment (*Chicago, B. & Q. vs. Chicago*, 166 *U. S.*, 226, 232.) But this court can at once see that if the legislaton of the State of New York was necessarily legislation to regulate commerce, or was so construed by the judgment of the court as to give it that effect, then this court can and should review the judgment rendered. The question is not what the court below *said* about the statute in this or any other case. The opinions of the Supreme Court of the State of New York in other cases, or the opinion of the Court of Appeals in this case, are valuable as giving us the views of those courts upon the true construction of the statute in question. But the question all the time is whether those opinions truly state the construction actually given to the statute in question *by the judgment rendered by the courts below*. If the judgment rendered by the courts below violates the Constitution of the United States by giving a construction to the statute that makes it a regulation of interstate commerce, then the judgment rendered is erroneous and should be reversed.

The judgment rendered by a direction of the court certainly rests upon the Act of 1896. That Act, as set out on our former brief (p. 35), contains additions that clearly indicate the intention to make it applicable to interstate commerce.

When a man can go to any ticket office of a railroad company, buy a book for a thousand miles, immediately, or at any time, demand a mileage ticket good as a first-class ticket, over a thousand miles of the railroad line or lines wherever he, his firm, or his family wishes to travel, it is clear that he is put in position to force a contract from the railroad company, if written in the very language of this statute, that utterly ignores State lines. Such a contract would not be a contract good only in the State of New York, but would be a contract good anywhere upon the line or lines of the railroad. It would be optional with the holder of it where he would travel, and upon what line or lines he would use it, if the contract, book, or ticket, was written in the very language of the statute, in the very language of the demand made by Purdy.

Now, for failing or refusing to give such a contract to Purdy, under such a statute, the Erie Railroad Company is held liable for

the penalty provided by legislation. There is not one syllable anywhere that Purdy, or any one, limited himself, or proposed to limit himself, to the State of New York in any way, shape or manner, in the book demanded, or the ticket to be obtained thereby. On the contrary, the demand was as broad as the statute, and consequently a judgment that the Erie Railroad Company is liable for refusing to comply with the demand is a judgment that the statute can be made operative, like a decree of the court, to force from the corporation a contract good anywhere and everywhere on its lines, at the option of the holder.

The vital point is not that the statute begins "Every railroad corporation operating a railroad in this State," but the vital point is that the statute of 1896 added the important provisions added that year. These provisions of what is sometimes called the "Pingree" legislation, were put in the statute to give it some value to the people who have money enough to buy transportation wholesale, instead of retail, provided they can get a discount of 33⅓ per cent. *This legislation ought to be labeled "Legislation to compel railroads to sell transportation wholesale to rich people, at a discount of 33⅓ per cent., and compel railroads to accept such transportation anywhere on their line or lines, at the option of the holder."*

Now this legislation operates upon any railroad of the State of New York like an injunction of the court. Any railroad of the State of New York is compelled to make and sell books in the form required by the statute, and to make and sell mileage exchange tickets therefor in the form provided by the statute. In that form, such books and such tickets would be as good outside of the State of New York as inside the State of New York, at the option of the holder. The Erie Railroad Company has refused to comply with this legislative injunction, or decree, and, because it has done so, courts of the State of New York have said it should be punished by being made to pay a penalty. If such a judgment is sound, it gives a construction to the statutes that forces the Erie Railroad Company to make books in this form, to make and sell this form of mileage exchange tickets, and to honor such books and such tickets anywhere on its line or lines when presented. It holds in effect that New York may regulate the rights and prices of interstate passengers. This is the construction necessarily given to this legislation by the judgment rendered. So both the States and Congress can regulate interstate commerce carriers as interstate traffic. The disclaimer on

this point in the opinion does not affect the direct command of the judgment that we either make and sell just such books and tickets as the statute of 1896 requires or pay penalties for refusing so to do. What power has the New York Legislature here? Chief Justice John Marshall said:

"It has been contended by the counsel for the appellant (Daniel "Webster) that as the word to regulate implies in its nature, *full* "*power* over the things to be regulated, it excludes, necessarily, the "action of all others that would perform the same operation on the "same thing. * * * There is great force in this argument "and the court is not satisfied it has been refuted." (*Gibbons vs. Ogden*, 9 *Wheat*, 1.)

In *Hall vs. DeCuir*, 95 *U. S.*, 485, the statute of Louisiana commences:

"*All persons engaged within this State* in the business of common "carriers of passengers, shall have the right to refuse to admit "any person to their railroad cars, street cars, steamboats, * * * "when such person shall, on demand, refuse or neglect to pay the "customary fare, * * * provided said rules and regulations "make no discrimination on account of race or color."

Mrs. DeCuir, a colored person, "took passage upon the boat "* * * from New Orleans, for Hermitage, a landing place "within Louisiana, and, being refused accommodations on account "of her color, * * * brought this action. * * * Benson, by "way of defense, insisted * * * that the statute was inopera-"tive and void * * * because as to his business it was an attempt "to 'regulate commerce among the States,'" (pp. 485, 486).

Nevertheless, judgment was given against Benson for $1,000 penalties under the statute. Upon appeal it was said:

"But we think it may safely be said that State legislation which "seeks to impose a direct burden upon interstate commerce, *or to* "*interfere directly with its freedom*, does encroach upon the exclusive "power of Congress. The statute now under consideration, in our "opinion, occupies that position. It does not act upon the business "through the local instruments to be employed after coming within "the State, but directly upon the business as it comes into the "State from without, *or goes out from within*. While it purports

"only to control the carrier when engaged within the State, it "must necessarily influence his conduct to some extent in the man- "agement of his business throughout his entire voyage. * * * "Commerce cannot flourish in the midst of such embarrassments. " * * * Uniformity in the regulations by which he is to be "governed from one end to the other of his route is a necessity in his "business, and to secure it Congress, which is untrammelled by "State lines, has been invested with the exclusive legislative power "of determining what such regulations shall be" (pp. 488–490.)

Upon the point there involved, and here involved, as to whether the statute could be confined to the State itself, the court rendered a judgment for the penalty. There, as here, the facts, the judgment, did not limit the words of the statute.

So the court then said:

"Such was the construction given to that Act in the courts be- "low, and it is conclusive upon us as the construction of a State "law by the State courts."

This language does not refer to the opinion of the court, for the court below did not admit it had given the Act an extra-territorial effect by its construction, but this language refers to the effect of the judgment for $1,000 penalty which had been rendered against Benson on the theory that such State legislation was valid. We think it quite apparent that this case is clearly in point here as to the form of the statute, the effect of the State construction necessarily given by the judgment for a penalty under such a statute, and upon the question of whether such a statute is a regulation of interstate commerce.

Wabash R. Co. vs. Illinois, 118 *U. S.*, 557, is a leading case also in point here. There, a statute of Illinois enacted, as stated in the syllabus:

"If any railroad company shall, *within that State*, charge or re- "ceive for transporting *passengers* or freight of the same class, the "same or a greater sum for any distance than it does for a longer "distance, it shall be liable to a penalty for unjust discrimination."

There, the complaint set up a violation of this statute, and demanded a penalty of $5,000 thereunder. The railroad company demurred to that complaint. There, the Illinois Supreme Court

said in its opinion: "That while the statute of Illinois is inopera-
" tive upon that part of the contract which has reference to the
" transportation outside of the State, it is binding and effectual as
" to so much of the transportation as was within the limits of the
" State of Illinois." (Opinion, p. 564; also 104 Ill., 476).

This court expressly held:

" If the Illinois statute could be construed to apply exclusively
" to contracts for a carriage which begins and ends within the State,
" disconnected from a continuous transportation through or into
" other States, there does not seem to be any difficulty in holding
" it to be valid. * * * The Supreme Court of Illinois having in
" this case given an interpretation which makes it apply to what we
" understand to be commerce among the States, although the con-
" tract was made within the State of Illinois, and a part of its per-
" formance was within the same State, we are bound, in this court,
to accept that construction" (pp. 564, 565).

Hall vs. DeCuir, 95 *U. S.*, 485, was cited as a leading and controlling case, and some of the identical language which we have quoted was there quoted with approval (pp. 570, 571).

Applying that case to railroad transportation the court there said:

" Whatever may be the instrumentalities by which this trans-
" portation from the one point to the other is effected, it is but one
" voyage, as much so as that of the steamboat on the Mississippi
" River. It is not the railroads themselves that are regulated by
" this act of the Illinois Legislature so much as the charge for
" transportation, and, in language just cited, if each one of the
" States through whose territories these goods are transported can
" fix its own rules for prices, for modes of transit, for times and
" modes of delivery, and all the other incidents of transportation to
" which the word 'regulation' can be applied, it is readily seen that
" the embarrassments upon interstate tranportation, as an element
" of interstate commerce, might be too oppressive to be submitted to.
" 'It was', in the language of the court cited above, 'to meet just
" such a case that the commerce clause of the Constitution was
" adopted.'

" It cannot be too strongly insisted upon that the right of con-
" tinuous transportation from one end of the country to the other is

"essential in modern times to that freedom of commerce from the "restraints which the State might choose to impose upon it, that "the commerce clause was intended to secure. This clause, giving "to Congress the power to regulate commerce among the States and "with foreign nations, as this court has said before, was among the "most important of the subjects which prompted the formation of "the Constitution. *Cook vs. Pennsylvania*, 97 *U. S.*, 566, 574; *Brown "vs. Maryland*, 12 *Wheat.*, 419, 446. And it would be a very feeble "and almost useless provision, but poorly adapted to secure the "entire freedom of commerce among the States which was deemed "essential to a more perfect union by the framers of the Constitu- "tion, if, at every stage of the transportation of goods and chattels "through the country, the State within whose limits a part of this "transportation must be done could impose regulations concerning "the price, compensation, or taxation, or any other restrictive "regulation interfering with and seriously embarrassing this com- "merce" (pp. 572, 573).

In *Covington B. Co. vs. Kentucky*, 154 *U. S.*, 204, a corporation was indicted for not complying with the law fixing the rates for the use of the bridge of the corporation. After litigation it was found guilty and fined $1,000. The questions presented were (1) whether the legislation impaired a contract; (2) regulated commerce; or (3) deprived the Bridge Company of property without due process of law. The court cited *Hall vs. DeCuir*, with approval (p. 215), and *Wabash R. Co.*, with approval (pp. 216, 217). It was apparently claimed, fixing toils for people to pass was not interstate commerce, but the court quoted *Gibbons vs. Ogden*, 9 *Wheat.*, 1 *and* 189, with approval on this point, and said: "The thousands of people who "daily pass and repass over this bridge may be as truly said to be "engaged in commerce as if they were shipping cargoes of mer- "chandise from New York to Liverpool. While the Bridge Company "is not itself a common carrier, it affords a highway for such "carriage" (pp. 218, 219).

The court further said:

"The authority of the State, so frequently recognized by this "court, to fix tolls for the use of wharves, piers, elevators, and im- "proved channels of navigation, has always been limited to such as "were exclusively within the territory of a single State, thus affect-

"ing interstate commerce but incidsntally, *and cannot be extended to "structures connecting two States without involving a liability of contro-"versies of a serious nature*" (p. 221.)

Here we have a structure, a railroad, of rails and bridges, connecting many States. It is a great artery of commerce over which passengers and freight pass to such an extent that its annual gross revenue is substantially forty million dollars a year. Competition has made its rates so low it has paid no dividends for years, notwithstanding this great income. It is a far more important artery of commerce than the Mississippi River was but a few years ago. It is subject to the laws of the States through which it passes in many things, because they permitted its creation by delegating to it the power of eminent domain. If they frame legislation in such a way as to interdict acts inimical to life, health, or property within their respective domains, they may exercise their police powers upon this corporation while subject to their jurisdiction. But when a State undertakes to fix the prices that passengers shall pay for transportation, the books they shall receive, the mileage tickets they shall get, the rights and privileges they shall be entitled to, and undertakes to enforce such provisions over the line or lines of an interstate railroad, and then the courts of the State hold a railroad liable for penalties for refusing to make or sell such books or tickets in the language of the statute, I think the case is brought squarely within the decisions quoted and the principles laid down in those decisions. If the legislation reviewed in the cases referred to embarrassed and interfered with the free flow of commerce, and thus became a regulation of commerce, contrary to the Constitution of the United States, this must be much more the case at the present time, when Congress has given the Interstate Commerce Commission power to condemn all "unjust," or "unreasonable" rates, and all "undue" discrimination, upon all interstate railroads. When two of the decisions relied on were made, Congress had not exercised this power, but, having exercised the power to regulate commerce as to railroads, as to the prices they may pay, the rates or charges they may make, it is perfectly clear, under all the cases, that no State may interfere in this domain. The Act of Congress providing for the free movement of interstate passengers and freights by rail was to "regulate" interstate commerce and make interstate commerce and railroads free even in the State itself,

as to the manner of doing interstate business (*Ill. C. R. vs. Ill.*, 163 *U. S.*, 142). If, however, the judgment rendered by the New York courts can stand, a precedent exists that will permit every State to embarrass, hamper and interfere with the movement of passengers and freight, to such an extent that commerce will cease to flow untrammelled, as it does now, under the protection of the Constitution of the United States. That this flow may continue, and this country may become the established leader of all nations in international commerce, it is essential that all such precedents as that created by the New York courts should be swept aside. The Interstate Commerce Act and the Postal Roads Act are a sufficient regulation of interstate commerce and railroads by Congress. Therefore, in the language of the Wabash case already quoted, "if each one of "the States can fix its own rules for *prices*, for *modes* of transit, * * "and all other incidents of transportation * * * the em- "barrassments might be too oppressive to be submitted to. It was " * * * to meet just such a case that the commerce clause of "Constitution was adopted."

Nor do the cases cited by the learned Judge in the opinion of the court below require a different ruling on this point.

In *W. U. T. Co. vs. James*, 162 *U. S.*, 650, it was held that State legislation requiring the Telegraph Company to transmit and deliver messages received within the State "with due diligence," or pay a penalty, did not directly interfere with or regulate interstate commerce. The decision there was rested on the ground that such legislation "may incidentally affect commerce and the persons engaged in it," without necessarily constituting "a regulation of commerce" (p. 656). *Hall vs. DeCuir* was there cited and quoted as laying down the true rule (pp. 657, 658, 660).

In *Hennington vs. Georgia*, 163 *U. S.*, 299, legislation of Georgia forbade the running of freight trains "on any railroad in the State on Sunday." An opinion of Judge Thurman while on the bench in Ohio was quoted as furnishing the true foundation of the decision there rendered, in these words:

"We are, then, to regard the statute under consideration as a "mere municipal or police regulation, whose validity is neither "strengthened nor weakened by the fact that the day of rest it "enjoins is the Sabbath Day. Wisdom requires that men should

"refrain from labor at least one day in seven, and the advantages "of having the day of rest fixed, and so fixed as to happen at "regularly recurring intervals, are too obvious to be overlooked. "It was within the constitutional competency of the general "assembly to require the cessation of labor, and to name the day of "rest." (P. 305.)

Even this decision, however, was not rendered without strong dissent.

In *Lake Shore vs. Ohio*, 173 *U. S.*, 285, the Legislature of Ohio requires three passenger trains to stop daily, Sunday excepted, at cities or villages containing over three thousand inhabitants, for a sufficient time to receive and let off passengers. The claim was that this was a regulation of interstate commerce when applied to the trains of the Lake Shore & Michigan Southern Railway Company. The court held otherwise, however, citing *Hennington vs. Georgia* as an authority in point. The court quoted with approval from the previous decision, in these words, as the root of its decision:

"Local laws of the character mentioned have their source in the "powers which the States reserved and never surrendered to Con- "gress, of providing for the public health, the public morals and "the public safety, and are not, within the meaning of the Con- "stitution, and considered in their own nature, regulations of inter- "state commerce, simply because, for a limited time, or to a limited "extent, they cover the field occupied by those engaged in such "commerce (p. 291).

In that case the court expressly recognizes the soundness of the decision in *Hall vs. DeCuir*, 95 *U. S.*, 488; *Wabash vs. Illinois*, 118 *U. S.*, 555; *and Illinois Central R. R. Co. vs. Illinois*, 163 *U. S.*, 142. (See opinion, pp. 303–307).

These are all the cases cited, and the opinion in the very last one clearly shows that the authorities on which we rely here are applicable and controlling. They are applicable and controlling because here we have a regulation of the price to be paid, and the character of the contract to be made by a passenger on an interstate railway, and certainly such requirements are of the very essence of the regulation of interstate commerce as to passengers. On the

other hand, the cases referred to by the court below are cases where the health or the convenience of citizens was subserved by the legislation within the State, and where, instead of a direct interference with interstate commerce, or regulation of it, there was no attempt to directly interfere with it. In those cases the effect was incidental and indirect, and being along the line reserved to the States, the legislation of the States was upheld. Here, however, we have a case where the very power granted to Congress is interfered with by the State, its legislation and its courts, and, therefore, we insist that the legislation complained of is void and the judgment rendered is erroneous because it attempts to enforce it.

V.

The judgment of the New York courts should be reversed, with costs, and the case remanded to those courts, with instructions to proceed in accordance with the decision of this court.

Respectfully submitted,

ADELBERT MOOT,

Counsel for Plaintiff in Error,

BUFFALO, N. Y.